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In The

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, ET AL., *Petitioners*,

v.

VERNA KELLY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Reply Brief for Petitioners Republican Party of Minnesota, Et Al.

Of Counsel:
Ronald D. Rotunda
The Albert E. Jenner, Jr.
Professor of Law
The University of Illinois
College of Law*
504 E. Pennsylvania Ave.
Champaign, IL 61820-6909
Ph. 217/333-3459
Fx. 217/244-1478
**for identification only*

James Bopp, Jr.
Counsel of Record
Thomas J. Marzen
Richard E. Coleson
JAMES MADISON CENTER FOR
FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
Ph. 812/232-2434
Fx. 812/235-3685
Counsel for Petitioners listed on inside cover

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James Bopp, Jr., Thomas J. Marzen, and Richard E. Coleson are Counsel for, and file this brief on behalf of, the following Petitioners: Republican Party of Minnesota, Indian Asian American Republicans of Minnesota, Republican Seniors, Young Republican League of Minnesota, Minnesota College Republicans, Muslim Republicans, Minnesota African-American Republican Council, Cheryl L. Wersal, Mark E. Wersal, Corwin C. Hulbert, and Michael Maxim.

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement remains unchanged. *See Petition for a Writ of Certiorari* at ii.

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REPLY BRIEF FOR PETITIONERS REPUBLICAN PARTY OF MINNESOTA, ET AL.

ARGUMENT

I. The Announce Clause Is Based on a Fundamental Misconception about Judges and the Judiciary.

Judges have public policy preferences and views on what the law is and should be, which have often been expressed in legitimate and salutary ways. When judges have discretion under the law or have been authorized to make law, those views will likely influence them. But when discretion has been denied judges, i.e., when the public policy choice has been made by constitutional provision, statutory enactment, or the stare decisis effect of prior court decisions, judges can be expected to follow their oath and apply the law to the case at hand, regardless of their personal views, or recuse themselves. This is what the electorate understands about judges, and it expects judges to act in this way. The electorate will reject judges it believes prejudge cases and thereby abandon their oath to follow the law.

The announce clause denies this reality and is based on two faulty assumptions: that the views of a judge do not matter[1]

[1] The rule [prohibit(ing) candidates from announcing their views on disputed legal and political issues] appears to be founded on the proposition that these views are, or should be, irrelevant to the judge's task.... Even supporters of the premise admit that judges sometimes face legal questions in which neither statute nor case law gives a firm answer. In such cases, a judge must turn to other grounds of decision, which can include the judge's views of good social policy, basic sense of fairness, or similar grounds, each of which will be affected to some

and that if a judge expresses her views on the law she can be expected to violate her oath and follow her personal views regardless of the facts and law of the particular case. However, judges do have views that influence them, *see The Responsible Judge: Readings in Judicial Ethics* 100 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993) [hereinafter *Responsible Judge*] ("'[V]alue choices' . . . are an inevitable ingredient of judicial decision making. The critical question is not *whether* value choices enter into the judicial interpretation of law, but *how* they enter and *from whence* they are derived."),[2] and these views matter since judges do make law in many legitimate ways, particularly state court judges. *See* Otto Kirchheimer, *Conditions of Judicial Action* and *Summing Up, in Responsible Judge* 50 & 61; Oliver W. Holmes, *The Common Law* 336 (1881); Benjamin N. Cardozo, *The Nature of the Judicial Process* 113-15 (1921); *Gregory v. Ashcroft*, 501 U.S. 452, 466-67 (1991). Since the people have reserved the selection of judges to themselves, they have a legitimate interest in knowing the judges' views. Furthermore, judges can be presumed to follow

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degree by the judge's legal and political views.

Patrick M. McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns* 85 (1990) ("*Electing Justice*"). "[Thus,] [i]f . . . we start with the proposition that judges cannot or should not disassociate themselves from their moral, social or political views, then we might permit or even encourage judicial candidates to discuss those views." *Id.* at 71. "This publication is used by the [Respondent] Board on Judicial Standards and its Executive Director in advising judicial candidates on proper campaign conduct." Joint Appendix 17 n.1 ("J.A.").

[2] *See also* John T. Noonan, Jr., *The Passengers of Palsgraf, in Responsible Judge* 22; Martha Minow & Elizabeth V. Spelman, *Passion for Justice, in Responsible Judge* 257.

their oaths or recuse themselves. Rep. Party Br. 13-21. As a result, expressions of views on the law by judges are encouraged by other judicial canons and are, in fact, a fundamental judicial function.

However, prohibiting judicial candidates from *pledging or promising* certain results in particular cases strikes the right balance. The pledges or promises clause recognizes that judges have views on the law, that these views will influence judges in exercising their discretion or in legitimately making law, and that, therefore, it is appropriate for the voters to know these views when selecting judges. But the pledges or promises clause also recognizes that it is contrary to a judge's oath to pledge or promise certain results in particular cases, regardless of the law or facts in that case.

In the same way, the pledges or promises clause strikes the proper First Amendment balance between the role of voters and candidates in elections and the interest in preserving the public perception of the impartiality of the judiciary. Voters are entitled to information about the general views of candidates on legal and political issues, and candidates have an interest in providing their views, especially when they are attacked. But it would undermine the public perception of the impartiality of the judiciary if the public were led to believe that it is appropriate for judges to pledge to violate their oath when in office.

The State, however, presents a simplistic formula upon which it bases an impossible dilemma in order to justify the announce clause. Its simplistic formula is that, if a judge expresses an opinion on a disputed legal or political issue,[3] she

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[3] Petitioners use the canon's language herein, understanding that the

has signaled how she will rule on that issue if it comes before her, no matter what the facts and the law are at the time. This then gives rise to the State's purported dilemma when a judge decides a case: if she decides the case consistent with her prior expressed view, she will be viewed by the electorate as having prejudged the case, and if she decides the case differently, she will be viewed as a dissembler. The only way out of this dilemma is silence, enforced by the state courts through the announce clause.

The State's argument is based on a series of fallacies. First, judges do have views, and these are often expressed in writings, speeches, public service, and deciding cases. A judge without views on the law would be unworthy of judicial appointment, and silence about these views over a lifetime is impossible. Second, announcing a view on a legal or political issue does not say how a judge will decide a particular case.[4] Often these

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Eighth Circuit construed it to have something to do with "implying," P. App. 45a, and that the State insists "announce" is broader than "pledges or promises." R.B. 41. But the Minnesota Supreme Court's textless new enforcement policy, R.A. 1, is too vague to determine the rule. *See* Wersal Reply Br. at IV. Furthermore, the entire Wersal Reply Brief is adopted and incorporated herein by reference.

[4]Examples abound. Justice Story explained his rejection of his own former opinion by stating: "My own error, however, can furnish no ground for its being adopted by this Court." *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 478 (1827). Justice Jackson concurred in an opinion contrary to his opinion as Attorney General and quoted Lord Westbury: "'I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.'" *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950). Judge Friendly dissented from a decision of the Second Circuit which relied on a law review article that Judge Friendly had authored. *Williams v. Adams*, 436 F.2d 30, 34 n.2, 35 (2d Cir. 1970). In *Hoy v. State*, 353 So.2d 826, 832 (Fla.

views are tentative and, upon fuller reflection, can and will change. Judges grow in their full appreciation of the law over time, and their judgment matures. Judges decide cases as full human beings, not mere repositories of legal views or skill, because judging requires compassion and fairness as judges seek to do justice in a particular case. Third, and most important, the voters know the difference. The electorate knows that judges have views on the law that may influence them, but they also expect judges to be impartial in deciding cases. Far from wanting judicial candidates to pledge themselves to specific outcomes in particular cases, the electorate poses the risk of defeat for judicial candidates who appear partial through their statements or judicial conduct.

It is true that there is tension between judicial accountability and independence in any method of judicial selection. *Electing Justice* at 7-8. While Minnesota has ensured independence of its judiciary from executive or legislative pressure through various constitutional provisions, it chose to make judges accountable to the people through periodic elections.

This choice gives rise to First Amendment protections of judicial candidate speech and the right of voters to receive this speech that are absent in merit selection systems. In some respects, the independence of the judiciary may be seen as compromised by elections, in ways that do not arise where appointment or merit selection is used to select judges with life tenure. *Chisom v. Roemer*, 501 U.S. 380, 400-01 (1991) ("The

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1977), a Florida trial judge is quoted as declaring that "[I] have long been opposed philosophically to capital punishment, and publicly stated . . . so on numerous occasions throughout the years," but then writing that "this Court must follow the dictates of the law" and imposing the death penalty.

fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.").[5]

However, this is the balance between accountability and independence that the people of Minnesota have struck and, as a result, they have the judiciary they have selected. If Minnesota doesn't like the result, it can provide for another system, such as merit selection of judges. Once the State chooses an elective system, it must also accept that inherent in that choice are the free speech rights of candidates and voters. But judicial impartiality can still be protected, and public perception of that impartiality preserved, by ensuring that judicial candidates in elections do not pledge or promise certain results in particular cases.

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[5] The wide variety of judicial selection methods chosen by the states testifies to our divergence of views about how to strike a balance between these competing concerns. Purely appointive systems tend to ensure the judges' independence and impartiality, but raise questions about accountability. Elective systems in any form give greater weight to direct popular accountability, but raise questions about the judges' ability to retain their independence and impartiality. It is no wonder that states have reached different conclusions on these matters, or that many states employ more than one system.

Electing Justice at 8.

II. That Each Justice Has Announced Views on the Disputed Legal Issue Here Does Not Deprive this Court of Actual or Apparent Impartiality in Rendering a Decision in this Case.

Throughout its Brief, the State quotes statements made by Justices of this Court during their confirmation hearings, in effect arguing that this Court has already unanimously approved the announce clause. *See* Brief and Appendix for Respondents 17, 21, 24, 25, 29-32 ("R.B."). The State concludes its Brief by asserting that "[e]ach Justice of this Court articulated a common principle during their confirmation hearings ... namely, that it would be improper for a judicial nominee to publicly state a position on issues likely to come before the Court." R.B. 48. Statements made during confirmation hearings are thus treated like judicial precedents, binding through stare decisis the decision of each Justice of this Court in this case.[6]

Paradoxically, the State would place the Justices of this Court on the horns of the very dilemma that they and the Eighth Circuit claim that the announce clause is intended to avoid -- namely, that "after being placed on the bench, the judge must follow his or her statements and be accused of prejudging the case or must ignore the statements and be accused of being

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[6] Petitioners are unaware of any case in which a judge was regarded as bound by any statements on issues made during an election campaign or confirmation process. The State's argument not only assumes that judicial nominees and candidates cannot be trusted to separate personal views on issues, when appropriate, from the manner in which they would decide a particular case, but it also assumes that judges will not alter their views upon fuller reflection. They thus seek to bind the Justices of this Court based on general views expressed in the particular context of confirmation hearings held as long as a quarter century ago.

a 'dissembler.'" R.B. 48 (quoting *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 878 (8th Cir. 2001), Appendix to Petition for Writ of Certiorari 46a ("P. App")).

Rather than demonstrating a need for the announce clause, the State's argument underscores the truth in Judge Posner's observation on the identical language of Illinois' announce clause: for the judicial candidate operating under the announce clause, "the only safe response . . . is silence" about any issue that stimulates political or legal controversy. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 228 (7th Cir. 1993).

The preposterous conclusion that follows from accepting the State's argument highlights the defective nature of its premise. Contrary to the State's argument, even if the Justices have announced their views on the propriety of judicial nominees answering certain questions about their legal or political views, this by no means impugns the actual or perceived impartiality of this Court to render a decision here. Nor are the Justices in any sense bound by the statements made in their confirmation hearings. Similarly, candidates for judicial elections need not remain silent on disputed legal or political issues to retain subsequent credibility in rendering future legal decisions. Consequently, the announce clause does not further the State's compelling interest in judicial impartiality.

First, none of the statements made by Justices cited by the State pledged or promised any particular outcome in this case. At most, the statements of the Justices expressed appropriate personal reservations about offering "hints" or "forecasts" on how votes would be cast. *See, e.g.*, R.B. 31 (Justice Ginsburg).[7]

[7]Justice Stevens also expressed concerns about making general comments on subjects "that were not carefully thought through," yet "might be given significance that they really did not merit." R.B. 31. Justice Kennedy believed that the public expects that Justices will not be confirmed on the basis of "particular positions on the issues," but rather that the public expects that the Senate will confirm on the basis of temperament and character. R.B. 42. Justice Souter opined that anything that could substantially inhibit a judge's capacity to "listen truly and to listen with a[n] open . . . mind" should be "off limits to a judge," expressing concern about the "pressure that would be on a judge who had stated an opinion or seemed to have given a commitment" during Senate confirmation proceedings. R.B. 25-26. Justice Breyer stated that he did not want "to commit [him]self on an open issue that [he] fe[lt] is going to come up in the Court," since mistakes might be easily made in the context of a confirmation proceeding and because it is "important that the clients and the lawyers understand the judges are really open-minded." R. B. 28-29. Chief Justice Rehnquist refused to answer specific questions regarding specific matters, such as the legitimacy of the presence of the U.S. military in Laos. R.B. 17. Justice Thomas recognized the need for a judge to ask, "Are we impartial or will we be perceived to be impartial?" R.B. 29. Justice Scalia expressed concern that one who "has made a representation in the course of his confirmation hearings . . . that he will do this or that . . . would be in a very bad position to adjudicate the case without being accused of having a less than impartial view of the matter." R.B. 29-30.

The State characterizes the Justices' statements as expressing support for the "Announce Clause principle." R.B. 25, 28, 29. However, if the announce clause "principle" is that judges should avoid actual or perceived lack of impartiality, this is not in dispute. Petitioners readily acknowledge that there is a legitimate and compelling interest in protecting actual and apparent judicial impartiality. Rather, the issue before the Court is whether the announce clause -- which clearly abridges the First Amendment rights of candidates, supporters, and voters --

is necessary to protect the public perception of judicial impartiality.

If the "Announce Clause principle" that the State claims the Justices of this Court have adopted is that judicial nominees and candidates may not express a point of view on disputed legal or political issues, then, by the State's logic, Justices of this Court have violated the "principle" by expressing a view on this very subject. Thus, if the State's theory is correct, the present Justices of this Court would be required to consider recusal. But under current practice, Justices of this Court need not recuse themselves simply because they announced their view on certain topics. The State's argument suggests a significant change in this practice.

But just as the members of this Court were free to decline to comment on legal and political issues to the extent that they deemed prudent during confirmation proceedings, so Minnesota judicial candidates would be under no compulsion to speak in the absence of the announce clause. It is one thing to question the wisdom of discussing views on a particular subject before the Senate or the electorate. It is quite another for the State to punish judicial nominees or candidates by depriving them of their judicial position or ability to practice law if they, their families, associates, or supporters publicly express the general views of the candidates on political or legal issues.

In fact, the announce clause would tend to subvert the very interest in preventing actual or perceived judicial partiality that it purports to serve. Voters ought to have information on the temperament, character, and impartiality of potential judges in order to properly evaluate them. A judicial candidate who recklessly announces positions on issues to the point where

voters sense that he lacks impartiality risks rejection by the voters.[8] Similarly, the voters need to know if a candidate runs on racist, sexist, or similar antisocial themes so that such candidates may be rejected. Too strict rules on what a candidate may say dresses the candidate up in a metaphorical three-piece suit. The voters need to hear the candidates' messages to see clearly who they are.

Second, the State's argument assumes that simply stating a view on a political or legal issue carries the necessary implication that the judicial candidate or nominee will decide a case in a certain way. But even if this possible implication were sufficient to justify an outright ban on expressing any views, it is nevertheless irrational to ban only the speech of judicial candidates, as the announce clause does, while encouraging judges to lecture, write, and teach on legal subjects and advocate changes in the law.[9] Indeed, if the State's theory is

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[8]In this respect, the enforced silence imposed by the announce clause makes such an informed decision by voters more difficult or impossible. It does not alter the fact that certain judicial candidates may lack impartiality; it only ensures that voters will not know that fact about the candidate.

[9]Minn. Canon 4(B) authorizes "avocational activities" by judges including advocating "revision of substantive and procedural law and improvement of criminal and juvenile justice" which she "is encouraged to do . . . either independently" or through professional organizations. 52 M.S.A., Code of Jud. Conduct, Commentary. This canon authorizes judges to widely announce their views on disputed legal and political issues. As a result, the State has failed to "demonstrate its commitment to advancing [its] interest by applying its prohibitions evenhandedly." *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). This canon, and the other purported exceptions to the announce clause enforcement policy recently adopted by the Minnesota Supreme Court, also "diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52

correct, the threat that the public will perceive a lack of impartiality when a sitting judge announces an opinion on a disputed legal or political issue is greater than the threat posed when a candidate does the same thing. This is so because sitting judges presently wield actual power to implement their points of view and because the statements of a sitting judge are likely to be taken more seriously than those of judicial candidates.

Moreover, whatever implications that an announced point of view on an issue might carry, they are no more weighty than the implications suggested by the associations and conduct of judges. A judge's professed allegiance to a particular religion, known life-style choice, adherence to a particular philosophy, racial or gender characteristics, or even selection of clients might carry the implication that the judge will decide a case in a certain way. But it is rightly presumed that judges will still be able to decide impartially.[10]

Any causal connection between the expression of general views on an issue and the possible appearance of lack of impartiality in a particular case is far too attenuated to justify

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(1994).

[10] *See In re Disqualification of Fuerst*, 674 N.E.2d 361(Ohio 1996) (Roman Catholic judges should not be automatically disqualified from hearing case involving sexual abuse by Catholic priest); *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399, 400 (9th Cir. 1995) (recusal not required in abortion case on grounds that Ninth Circuit Judge John Noonan's "fervently-held [Roman Catholic] religious beliefs would compromise [his] ability to apply the law."); *Idaho v. Freeman*, 507 F. Supp. 706, 727-29 (D. Idaho 1981) (background affiliations, including Mormon religious association, should not be considered as grounds for disqualification in case involving proposed Equal Rights Amendment).

the draconian announce clause. Even if the announce clause is rationally, if remotely, related to protecting an interest in the public perception of judicial impartiality, its blunderbuss approach is not narrowly tailored to satisfy only this interest, nor is it the least restrictive means available to do so.

III. The Interest at Stake in this Case Is in Assuring the Public Perception of Judicial Impartiality, Not in Protecting Judicial Independence.

Petitioners readily agree with the validity of the State's compelling interests in judicial independence and impartiality. Throughout its Brief, however, the State consistently confuses these interests, conflates them, and thereby argues that the announce clause serves both. *See* R.B. 20 n. 4.

Plainly, however, the Minnesota Constitution, while providing for the independence of its judiciary from the legislative and executive branches, does not intend that the judiciary be free from the people. The State, therefore, cannot plausibly argue that the announce clause is supported by an interest in judicial independence from the necessary implications of accountability to the people in periodic elections.

The several citations the State provides in favor of "judicial independence" here really reflect the distaste of many authorities for judicial elections -- matters that have been debated since the inception of the Republic. *See, e.g.*, R.B. 15-19. Any concerns about judicial elections, however, can be addressed by the people of Minnesota through amendment to their Constitution, not by stifling the rights of judicial candidates and voters that are protected by the First Amendment of the federal constitution. Likewise, to the extent that there are legitimate concerns about maintaining judicial impartiality in

the face of political pressures in elections, these concerns are (and can be further) addressed by methods that do not ride roughshod over free political speech – such as rules against pledges and promises, contribution limits, and recusal requirements.[11]

IV. The State Offers No Substantial Evidence in Support of a Need for the Announce Clause.

The State relies on alleged "evidence of widespread and longstanding consensus" to support its claim that the announce clause is necessary. R.B. 33 (citing *Republican Party of Minnesota*, P. App. 49a, citing *Burson v. Freeman*, 504 U.S. 191 (1992)).[12] But unlike the circumstances in *Burson*, in which the

[11]Respondents erroneously claim that the "essence of Petitioners' argument is that the public deserves judges who have less independence and impartiality than their mail carriers." R.B. 14 (citing *U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973)). To the contrary, the essence of the State's argument is that judicial candidates, their families and associates, and the voters deserve less freedom of speech than mail carriers. There is a fundamental difference between barring government employees from political organizing and barring candidates for election from speaking on issues, and this Court has not held that the government can forbid mail carriers from even expressing their views on disputed legal and political issues.

[12]The State cites *Moon v. Halverson*, 288 N.W. 579 (Minn. 1939), and *Peterson v. Stafford*, 490 N.W. 2d 418 (Minn. 1992), to support its argument of a consensus in Minnesota "about the necessity of restrictions on campaign speech that conveys a judicial candidate's propensity to decide cases in a particular way." R.B. 33 (quoting *Republican Party of Minnesota*, P. App. 49a). However, *Moon* was largely concerned with political party partisanship in judicial elections, and the only consensus reached was that a statute prohibiting party designations for certain candidates applied only when filing for nomination and on the ballot itself. *Moon*, 288 N.W. at 581. Furthermore,

polling place electioneering bans at issue were decades old and nearly universal, there is no "long, uninterrupted, and prevalent use," *Burson*, 504 U.S. at 208, of the announce clause that might make specific evidence about the clause's value difficult to adduce. The Minnesota announce clause is fairly novel and far from universal. *See* Wersal Br. 26-30. Thus, it should have been a simple matter to "put on witnesses who can testify" from personal knowledge "as to what would happen without" an announce clause. *Burson*, 504 U.S. at 208. Yet they have offered no such evidence.[13]

Nine states have partially or fully elected judiciaries and have either no announce or commitments clause or a provision

neither the holding of *Peterson* nor the history it traces addresses or even considers the speech restrictions at issue here, but instead *Peterson* focuses on concern and debate over "the inherent tension in the judicial election process" that culminated in the recommendation and rejection of "a Missouri-type retention plan" in 1972. 490 N.W.2d at 422-23.

[13]The State relies on an affidavit by former Minnesota Governor Arne H. Carlson as evidence of a consensus in Minnesota about the necessity of judicial campaign speech restrictions. R.B. 34 n.6. But the former Governor's main concern was that partisan elections "erect additional barriers" to seating "the best qualified candidates available." J.A. 245, 247 ¶ 5. He also opined that newspaper headlines touting political party endorsement of judicial candidates would "greatly harm the public's confidence in the independence of the judiciary." *Id.* 247-48 ¶ 6. Former Minnesota Supreme Court Chief Justice A.M. Keith expressed a similar concern with partisan elections, i.e., that the "prospect of facing a contested election . . . is daunting to most judges" and that "partisan campaign activities" would lead "many qualified judges and potential judges . . . not to participate." J.A. 266, 268 ¶ 5. He did not address the announce clause or its substance, and only mentions Canon 5 in reference to its prohibition of soliciting campaign contributions, party endorsement, and "other campaign activities." *Id.* ¶ 6.

that is significantly more speech permissive.[14] Were the State's conjecture true, then "widespread recusals and disqualifications" based on judicial electoral announcements would be common in these nine states. R.B. 44. In addition, judicial decisions in these states would "always be suspect." R.B. 43. There is no evidence, however, that this has happened. Indeed, where state courts have opined on the matter in these states, the courts recognize that a judicial candidate's public view on an issue or public statement on judicial philosophy is insufficient to require recusal or disqualification.[15]

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[14]Alabama, Ala. R. Jud. Ethics Canon 7(B)(1)(c) ("A candidate for judicial office . . . shall not announce in advance the candidate's conclusions of law on pending litigation"); Connecticut (none); Idaho (none); Michigan (none); North Carolina (none); Oregon (none); Texas, Tex. Code Jud. Conduct Canon 5(1) ("A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case."); Utah (none); Wisconsin, Wis. Sup. Ct. R. 60.06(3) ("A judge who is a candidate for judicial office shall not make or permit others to make in his or her behalf promises or suggestions of conduct in office which appeal to the cupidity or partisanship of the electing or appointing power. A judge shall not do or permit others to do in his or her behalf anything which would commit the judge or appear to commit the judge in advance with respect to any particular case or controversy or which suggests that, if elected or chosen, the judge would administer his or her office with partiality, bias or favor.").

[15]*See Papa v. New Haven Federation of Teach.* 444 A.2d 196, 206 (Conn. 1982) ("[I]t is difficult to perceive why judges' general, extra-judicial comments concerning legal issues disqualify them from hearing later cases involving those issues."); *Olsen v. Doerfler*, 165 N.W.2d 648, 654 (Mich. Ct. App. 1969) (no disqualification required where a judge publicly criticized obscenity and pornography before ruling on an obscenity matter); *Oregon v.*

Beyond state case law, judicial conduct commissions maintain summaries of the types of complaints filed with their commissions against judicial candidates. Six of the nine states publicly disclosed summaries of the operations of their commissions through annual reports.[16] If the State's imagined harms were real, judicial commission reports would reflect these concerns. In fact, the majority of judicial complaints in these states are dismissed.[17] Those complaints related to "failure to

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Crookham, 731 P.2d 1018, 1023 (Or. 1987) (grounds for disqualification must "relate to a judge's impermissible animus toward a particular party or attorney"); *Rogers v. Bradley*, 909 S.W.2d 872, 883 (Tex. 1995) (Justice Enoch, responding to declaration of recusal, noted that his statements did not require his recusal because they did not indicate a "promise either of a particular result nor an endorsement of any other candidate or issue."); *State v. Sinks*, 483 N.W.2d 286, 291 (Wis. Ct. App. 1992) (no due process rights violated when a judge fails to recuse himself because issues present in the litigation are similar to those that are highly contested in the judge's reelection).

[16]Alabama, Connecticut, Michigan, Texas, Utah, and Wisconsin all publicly disclose some record of their judicial conduct commissions' activities. In the state summaries, one would expect that complaints filed against judges or judicial candidates based on their campaign statements would be categorized under either "failure to recuse" or "improper political activity."

[17]Alabama: (1999-2000) 93%-94% complaints dismissed. *Ala. Jud. Inquiry Comm'n Ann. Rep.* at 16 (1999) & 16 (2000). Connecticut: (1997-2001) 97%-100% complaints dismissed or barred by statute of limitations. *Conn. Jud. Rev. Council Ann. Rep.* at 5 (1997), 7-8 (1998), 8-9 (1999), 8-9 (2000), 8-9 (2001). Texas: (1998-2001) 91%-93% complaints dismissed. *Texas Comm'n on Jud. Conduct Ann. Rep.* at 23 (2001). Utah: (1997-2001) 79%-89% complaints dismissed. *Utah Jud. Rev. Council Ann. Rep.* at 6 (1997), 6 (1998), 11 (1999), 8 (2000), 9 (2001). Wisconsin: (1996-2000) 85% initial inquiries dismissed. *Wis. Jud. Comm'n Case Disposition Table A-1* (visited Mar. 11, 2002) <http://www.courts.state.wi.us/judcom/CUMULATIVE%20TABLES.

recuse" or "improper political activity" are exceedingly low.[18]

V. The People Can Be Trusted to Elect Judges That Will Be Faithful to Their Oath.

The American people understand the dual role of judges: to make law when so authorized and to follow the law when required. *Williams v. United States*, 535 U.S. ___, 70 U.S.L.W. 3091, 2002 WL 334147 (2002) (Breyer, Scalia, Kennedy, JJ., dissenting from cert. denial) ("[T]he American public has understood the need and the importance of judges deciding important constitutional issues without regard to considerations of popularity."). It is true that "the devil is in the details." There is often vigorous debate among judges, lawyers, the people, and the press about whether a particular decision by a judge is faithful to the law or an unwarranted expression of a judge's own personal views contrary to the law.

That such a debate takes place, however, is a reflection of the fact that all understand the judge's dual role and that judges are accountable for the faithful performance of their duties. Those with life tenure are accountable ultimately to the

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html>; (1985-2000) 91.5% Commission investigations dismissed. *Table A-3. Id.*

[18]Alabama reports that 3%-4% of complaints in 1999 and 2000 were related to campaign conduct, while 6% of complaints during this time were related to failure to recuse. *Ala. Jud. Inquiry Comm'n Ann. Rep.* at 19 (1999) & 19 (2000). Michigan notes that .4%-2.5% of complaints were related to political activity during 1998-2000. *Mich. Jud. Tenure Comm'n Ann. Rep.* at 10 (1998), 10 (1999), 12-13 (2000). Lastly, Wisconsin has had 3 informal resolutions of partisan political activity in 15 years. *Wis. Jud. Comm'n Case Disposition Table A-3* (visited Mar. 11, 2002) <http://www.courts.state.wi.us/judcom/CUMULATIVE%20TABLES.html>.

judgment of history. Judges who stand for periodic elections are also subject to more immediate and concrete consequences. But judges are accountable -- and who can say with certainty that the judgment of historians should be preferred over the judgment of the people. For those judges subject to elections, however, the choice has been made: these judges are subject to the judgment of both historians and the people -- and the First Amendment guarantees that the people will have the information necessary to exercise that judgment. The announce clause unconstitutionally deprives them of that information.

CONCLUSION

Petitioners pray this Court to reverse the Eighth Circuit and hold the announce clause of Minnesota Judicial Canon 5A(3)(d)(i) unconstitutional under the First and Fourteenth Amendments.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Thomas J. Marzen
Richard E. Coleson
JAMES MADISON CENTER FOR FREE SPEECH
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807-3510
Ph. 812/232-2434
Fx. 812/235-3685
Counsel for Republican Party of Minnesota, et al.